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No. 93-908

In The

Supreme Court of the United States

October Term, 1993

CHARLES J. REICH,

Petitioner,

v.

MARCUS E. COLLINS and THE GEORGIA DEPARTMENT OF REVENUE,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Due Process requires the State of Georgia to refund income taxes which petitioner voluntarily paid on his federal retirement benefits before this Court's decision in *Davis v. Michigan*, 489 U.S. 803 (1989), when there were predeprivation remedies by which petitioner could have contested his Georgia income tax liability prior to payment.

2. Whether the Supreme Court of Georgia, by construing Georgia's income tax refund statute to be inapplicable to taxes paid under a law later held invalid, deprived the petitioner of an alleged statutory right to such a refund, in violation of Due Process.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

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Respondents in the above-styled action respectfully oppose the Petition for Writ of Certiorari to the Supreme Court of Georgia. Despite the assertions by the Petitioner and amici, there is no "conflict" among the state supreme courts which warrants certiorari. Moreover, both questions presented by the petition concern issues to which this Court has already spoken, and which the Court has resolved against the position of the Petitioner here. Accordingly, Respondents request that the petition be denied.

CITATION TO OPINION BELOW

The opinion of the Georgia Supreme Court, which has not yet been officially or unofficially reported, is set forth in *Reich v. Collins*, Nos. S92A0621 and S92A0622 (Ga. Dec. 2, 1993) (LEXIS, States library, Ga. file). The text of the opinion is also included as Appendix A to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

On March 28, 1989, this Court ruled in *Davis v. Michigan*, 489 U.S. 803 (1989), that income tax statutes in Michigan, which provided for the taxation of federal retirement benefits but exempted retirement benefits paid by the state and its political subdivisions, violated 4 U.S.C. § 111 and principles of intergovernmental tax immunity. At the time of the *Davis* decision, Georgia's income tax statutes totally exempted pension income received from the Employees' Retirement System of Georgia, the Teachers Retirement System of Georgia, and certain other retirement systems, *see* O.C.G.A. § 48-7-27(a)(4) (1982), but did not afford the same treatment to federal retirement benefits. In response to *Davis*, the Georgia General Assembly, during special session in September 1989, amended Georgia's law to provide identical treatment for federal, state, and private pensions, for the tax years 1989 and forward. *See* O.C.G.A. § 48-7-27(a)(5) (Supp. 1993).

Shortly after *Davis* was announced, Petitioner Charles J. Reich ("Colonel Reich" or "the taxpayer") filed refund claims with the Department of Revenue for Georgia income taxes which he had voluntarily paid on his

military retirement benefits for the years 1985 through 1988. When the Department denied his claims, the taxpayer brought suit under O.C.G.A. § 48-2-35, contending that Georgia's taxation of such amounts violated the principles set forth in *Davis*, the Fifth and Fourteenth Amendments to the U.S. Constitution, and comparable provisions of the Georgia Constitution. Both the Respondents and the taxpayer subsequently filed motions for summary judgment.

In its final order, the trial court ruled that Georgia's pre-1989 income tax statute was legally indistinguishable from the statute considered in *Davis*. Petition for Writ of Certiorari ("Petition"), App. E. However, the trial court also determined, based on the three-part test set forth in *Chevron Oil v. Huson*, 404 U.S. 97 (1971), that *Davis* should not be applied retroactively to any tax years ending before the *Davis* decision was rendered, and that no refunds were due. The Georgia Supreme Court granted Col. Reich's application for discretionary appeal. *See* O.C.G.A. § 5-6-35(a).

On November 19, 1992, the Georgia Supreme Court held that the state's pre-1989 income tax statutes violated the principles of *Davis*, and that this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), mandated retroactive application of *Davis*. *Reich v. Collins*, 262 Ga. 625, 422 S.E.2d 846 (1992) (hereinafter *"Reich I"*). However, the Georgia Supreme Court also determined that O.C.G.A. § 48-2-35 did not apply to taxes paid under a law later held unconstitutional, and that Colonel Reich was therefore not entitled under that statute to the refunds he sought. After his motion for

reconsideration was denied, the taxpayer filed a petition for certiorari with this Court, contending, *inter alia*, that Due Process entitled him to refunds if Georgia's refund statute did not.

On June 18, 1993, this Court issued its decision in *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993). In *Harper* the Court held, based on the reasoning of its earlier decision in *Beam*, that *Davis* applied retroactively to tax years before 1989. *Id.* at 2516-18. The Court noted at the same time, however, that "federal law does not necessarily entitle [federal retirees] to a refund" of amounts paid on their benefits for years before 1989 under income tax statutes invalidated by *Davis*. *Id.* at 2519. "Rather, the Constitution requires [a state simply] 'to provide relief consistent with federal due process principles.' " *Id.* at 2519 (quoting *American Trucking Assns v. Smith*, 496 U.S. 167, 181 (1990) (plurality opinion)). The Court reversed the Virginia court's earlier holding that *Davis* applied prospectively only, but remanded for resolution of the distinct state law remedial issues which remained. *Id.* at 2520. Two weeks later, this Court vacated the decision in *Reich I*, and remanded for reconsideration in light of *Harper*. 61 U.S.L.W. 3867 (U.S. June 28, 1993).

On December 2, 1993, the Georgia Supreme Court held on remand that Due Process did not entitle the taxpayer to a refund of the taxes he voluntarily paid on his federal retirement benefits prior to the decision in *Davis*, since Georgia law provided predeprivation remedies by which he could have contested his taxes prior to payment. *Reich v. Collins*, Nos. S92A0621 and S92A0622 (Ga. Dec. 2, 1993) (LEXIS, States library, Ga.

file) (hereinafter "*Reich II*"). The taxpayer filed the instant petition for certiorari on December 8, 1993.

Response to the Taxpayer's Statement of the Case

The "Statement" on pages 4 through 7 of the taxpayer's petition contains certain assertions that are unsupported in the record, misleading, or irrelevant to this case. The taxpayer states that "[f]ollowing *Davis*, state officials in Georgia advised retirees to file refund claims under O.C.G.A. § 48-2-35 by filing amended returns." Petition, p. 4. No effort was made in the trial court to establish a record concerning any such "advice". Except for a newspaper article which coincidentally refers to statements purportedly made by a Revenue Department official, which was attached for other reasons as an exhibit to a deposition taken by the taxpayer, there is nothing whatsoever in the record even arguably supporting this assertion. Moreover, Col. Reich seems to be suggesting that statements made after *Davis* misled him into foregoing a pre-payment challenge to his taxes, even though the amounts which he seeks to recover were paid prior to this Court's decision in *Davis*.

On page 6 of his petition, the taxpayer refers to the proceedings in *Avery T. Salter, et al. v. The State of Georgia, et al.*, Fulton Superior Court, Civil Action No. D-71448, litigation in which he was involved before the present action commenced. Col. Reich has also included as Appendix F to his petition a copy of the trial court's order dismissing that action. The taxpayer made no record in the trial court concerning the earlier litigation, and although he attempted to fill that gap at the Georgia

Supreme Court level simply by attaching copies of selected portions of the *Salter* file to his appellate brief, nothing which transpired in the *Salter* litigation is properly a matter of record here. The proceedings in *Salter* are also irrelevant to the issues presented here, for the reasons stated on page 15 *infra*.

Finally, the description of the Georgia Supreme Court's decision in *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74 (1989) on page 5 of the petition is incomplete and inaccurate. *See* pages 14-15 *infra*.

SUMMARY OF ARGUMENT

The petition in this case advances two legal arguments. The first is that Due Process requires the State of Georgia to refund income taxes which Col. Reich voluntarily paid on his federal retirement benefits before this Court's decision in *Davis v. Michigan*, 489 U.S. 803 (1989), even though there were predeprivation remedies under state law by which he could have contested such taxes prior to payment. The taxpayer and amici submit that certiorari should be granted because of an alleged "conflict" between the holding of the Georgia Supreme Court and decisions by other state courts of last resort. The supposed "conflict" is contrived. Both *Harper* and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990) recognize that a particular state's pre- and post-payment remedial scheme can affect the Due Process inquiry, and the holdings elsewhere can be explained on the basis of such differences. In fact, the taxpayer's Due Process argument in this case was settled

by the Court's decision in *McKesson*, holding that "[t]he availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivation sufficient by itself to satisfy the Due Process Clause." 496 U.S. at 38 n.21.

The taxpayer's second argument – that the Supreme Court of Georgia, by virtue of its construction of Georgia's income tax refund provisions, violated Due Process by depriving the taxpayer of an alleged statutory right to the refunds he seeks – is based on the taxpayer's belief that a state court decision on a question of state law violates the Fourteenth Amendment if the decision reverses prior cases or is somehow "wrong". While the Respondents do not agree with the taxpayer's characterization of the Georgia Supreme Court's interpretation of Georgia's refund statute, the general proposition on which this Due Process argument rests has nevertheless been explicitly rejected by this Court in the past.

ARGUMENT

I. BECAUSE THERE WERE PREDEPRIVATION REMEDIES BY WHICH PETITIONER COULD HAVE CONTESTED HIS TAX LIABILITY PRIOR TO PAYMENT, DUE PROCESS DOES NOT REQUIRE THE STATE OF GEORGIA TO REFUND INCOME TAXES WHICH PETITIONER VOLUNTARILY PAID ON HIS FEDERAL RETIREMENT BENEFITS.

Col. Reich asserts that "this Court will invite inconsistent and confusing results unless it provides definitive

guidance in this case." Petition, p. 8. Amici argue that certiorari should be granted because the Georgia Supreme Court's holding is in direct conflict with *Davis* decisions rendered after *Harper* by other state courts of last resort, *see Hagge v. Iowa Dep't of Revenue and Finance*, 504 N.W.2d 448 (Iowa 1993); *Strelecki v. Oklahoma Tax Comm'n*, No. 77,615 (Okla. Sept. 28, 1993) (LEXIS, States library, Okla. file); *Brumley v. Utah State Tax Comm'n*, No. 910242 (Utah Sept. 2, 1993) (LEXIS, States library, Utah file), and with the holding in *Standard Oil, Inc. v. North Dakota*, 479 N.W.2d 815 (N.D. 1992). For the reasons discussed below, the supposed "conflict" with other state decisions is contrived. In fact, this Court provided definitive guidance in *Harper* and in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), where it held that "[t]he availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivation sufficient by itself to satisfy the Due Process Clause." 496 U.S. at 38 n.21.

Decisions In Other States

This Court recognized in *Harper* that the outcomes in cases like this could differ, depending on the particular state's pre- and post-payment remedial scheme. *See Harper*, 113 S. Ct. at 2520 ("[t]he constitutional sufficiency of any remedy . . . turns (at least initially) on whether [state] law 'provide[s] a[n] [adequate] form of predeprivation process' ") (quoting *McKesson*, 496 U.S. at 36-37). Although Col. Reich and amici clearly would prefer otherwise, a proper application of the same Due Process principles may result in federal retirees receiving refunds in some states but not in others. This is not the type of "conflict" justifying a grant of certiorari in this case.

In *Hagge*, for example, Iowa taxing officials asserted that federal retirees could have brought an action to enjoin the unconstitutional collection of income taxes on their pensions, and that this procedure was an adequate predeprivation remedy. The Iowa Supreme Court observed that:

> The department cites only one case . . . in support of its claim that equitable relief would have been available to Hagge and other taxpayers. . . . We are persuaded that the department's consent to the procedure [in the case cited] was motivated more by desire to promptly resolve a well-orchestrated statutory challenge than by belief that equitable relief is ordinarily available to tax protestors.
>
> . . . [W]e note that the position taken here by the department is essentially contrary to that advanced in [other litigation], where we held that the *absence* of predeprivation hearings in the taxing context is amply justified by the practicalities of tax collection. . . .
>
> Within the more customary channels for protesting tax assessments, the department cites neither statute nor administrative rule that would permit taxpayers to 'withhold payment and then interpose their objections as defenses in a tax enforcement proceeding.'

504 N.W.2d at 451 (emphasis in original). By contrast, the Utah Supreme Court's opinion in *Brumley* does not reflect that predeprivation remedies were even asserted as a defense.

The only arguable conflict in *Davis* cases since *Harper* arises from the decision by the Oklahoma Supreme Court in *Strelecki*. The Oklahoma court's Due Process discussion is so clearly wrong, however that it cannot create a "conflict" sufficient to warrant certiorari here. The Oklahoma Supreme Court stated that taxpayers who paid amounts under a statute which had not yet been declared unconstitutional must – as a matter of Due Process – be afforded an adequate opportunity to obtain a refund of such amounts once the statute is invalidated, and that the availability of predeprivation remedies under which such a taxpayer could have secured the ruling of unconstitutionality himself makes no difference. *Strelecki*, slip op. at 19. Even Col. Reich and amici do not make this argument, for it is completely at odds with this Court's holdings in *McKesson* and *Harper*. Moreover, in view of what the Oklahoma Supreme Court determined to have been a binding, pre-*Harper* concession regarding the availability of refunds under state law, *Strelecki's* Due Process discussion is dictum. *See Strelecki*, slip op. at 15 ("the Commission is bound . . . by [its] pre-*Harper* position" that refunds would be due if *Davis* applied retroactively).

The last decision which amici maintain "conflicts" with the holding of the Georgia Supreme Court is *Standard Oil, Inc. v. North Dakota*, 479 N.W.2d 815 (N.D. 1992). The North Dakota Supreme Court found that a company subject to motor fuel taxes in North Dakota did not have "a meaningful opportunity to withhold payment and obtain a predeprivation determination of the [tax's] validity" because the company would lose its license to do business in that state if it refused to pay. 479 N.W.2d at

822-23. Col. Reich faced nothing comparable if he had pursued a pre-payment remedy in Georgia to contest his income taxes. Again, *Harper* and *McKesson* recognize that a particular state's statutory scheme can affect the Due Process inquiry, and all the decisions supposedly creating a "conflict" with the holding below are easily explained on that basis.

McKesson, Harper, and The Decision In This Case

Col. Reich's argument that Due Process requires the State of Georgia to refund income taxes which he voluntarily paid on federal retirement benefits before the decision in *Davis*, even though predeprivation remedies were available under state law by which he could have contested such taxes prior to payment, is foreclosed by the decision in *McKesson*. Respondents submit that *McKesson* addresses only a state's Due Process obligation to return taxes collected under a statute which the state, from the date of enactment, knew or should have known was unconstitutional. As the *McKesson* Court observed, "[t]he [challenged] Liquor Tax reflected only cosmetic changes from the prior version of the tax scheme that itself was virtually identical to the Hawaii scheme invalidated in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984). . . . The State can hardly claim surprise at the Florida courts' invalidation of the scheme." *Id.* at 46. *See* Hellerstein, *Preliminary Reflections On McKesson and American Trucking Associations*, 48 Tax Notes 325 (*McKesson* held that "a taxpayer who is compelled to pay a tax that is later held to be unconstitutional under established Commerce Clause principles is entitled to meaningful retrospective

relief.") By contrast, the unconstitutionality of Georgia's tax treatment of federal retirees was not clear prior to *Davis*. *See Harper*, 113 S. Ct. at 2538 ("The circumstances in *McKesson* were quite different than those here. In *McKesson*, the tax imposed was patently unconstitutional.") (O'Connor, J., dissenting).

Even under a broader reading of *McKesson*, however, the Due Process rights of Col. Reich were not violated by the State of Georgia. As stated in *McKesson*,

> in order to satisfy the commands of the Due Process Clause[, the] State may choose to provide a form of "predeprivation process," for example, by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding initiated by the State.

McKesson, 496 U.S. at 36-37 (footnotes omitted). "The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivation sufficient *by itself* to satisfy the Due Process Clause, and taxpayers cannot complain if they fail to avail themselves of this procedure." *Id.* at 38 n.21 (emphasis added). These principles were reaffirmed in *Harper*, 113 S. Ct. at 2519.

In *McKesson*, the Court observed that Florida had established procedures designed so that taxpayers "tender tax payments *before* their objections are entertained and resolved". *McKesson*, 496 U.S. at 38 (emphasis in original).

> As a result, Florida does not purport to provide taxpayers like petitioner with a meaningful

> opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity; rather, Florida *requires* the taxpayers to raise their objections to the tax in a post-deprivation refund action.

Id. at 38 (footnote omitted). "[I]n *McKesson*, the fact that Florida had provided no predeprivation relief was dispositive. Only because the state had provided no 'procedural safeguards against unlawful exactions' was it required to render meaningful backward looking relief." Note, *Nonretroactivity in Constitutional Tax Refund Cases*, 43 Hastings L. J. 421, 469-70 (1992). *Accord The Supreme Court-Leading Cases*, 104 Harv. L. Rev. 129, 190 (1990) (*McKesson* concerns situations where "a state provides a taxpayer with only a post-payment remedy"). In contrast to the situation in *McKesson*, the Georgia Supreme Court correctly reaffirmed that there were several methods whereby Col. Reich could have contested his Georgia income tax liabilities for 1985 through 1988 prior to payment.

Georgia's predeprivation remedies

A taxpayer may, within 30 days of the issuance of a deficiency assessment against him, request a hearing under Georgia's Administrative Procedures Act ("APA"). O.C.G.A. § 50-13-12. If he receives an adverse administrative decision, the aggrieved taxpayer may seek superior and appellate court review. O.C.G.A. §§ 50-13-19, -20. After receiving a notice of assessment, a taxpayer may choose to forego an administrative hearing, appealing directly to the superior court for judicial review. O.C.G.A. § 48-2-59. *See Gainesville-Hall County Economic Opportunity Organization, Inc. v. Blackmon*, 233 Ga. 507, 212 S.E.2d 341

(1975); *Waldron v. Collins*, 788 F.2d 736, 738 (1986). Declaratory and injunctive relief are also available to challenge unconstitutional statutes and taxes. *See Parrish v. Employees' Retirement System of Georgia*, 260 Ga. 613, 398 S.E.2d 353 (1990) (suit for declaratory and injunctive relief challenging constitutionality of amendments to income tax statute); *State v. Private Truck Council of America*, 258 Ga. 531, 371 S.E.2d 378 (1988) (suit for declaratory and injunctive relief challenging validity of highway user taxes); *Blackmon v. Golia*, 231 Ga. 381, 202 S.E.2d 186 (1973) (suit for injunctive relief to challenge constitutionality of alcohol tax statute). *Reich II*, slip op. at 3-4 (App. A, pp. 4A-5A.) In addition, if the taxpayer has chosen not to pursue any other predeprivation remedy, and faces a Revenue Department writ of execution for the disputed taxes, an "affidavit of illegality" is available to stop any actual collection efforts. O.C.G.A. § 48-3-1. In providing such predeprivation remedies, the State of Georgia has done all that Due Process requires, even if Georgia's tax treatment of federal retirees could have been considered "patently unconstitutional" before *Davis*.

According to Col. Reich, that portion of the Georgia Supreme Court's decision regarding declaratory and injunctive relief "defies logic". Petition, p. 10. The taxpayer asserts that "the Georgia Supreme Court denied [such] relief to federal retirees . . . four years ago [in *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74 (1989)]." *Waldron* was filed immediately after *Davis* was decided. By the time of the Georgia Supreme Court's decision, however, the legislature had amended Georgia's statutes to eliminate any disparity between state and federal retirees, and the constitutionality of Georgia's law was no

longer in doubt. Because the record did not indicate that any of the actual parties involved had not already paid their taxes for years still affected by *Davis*, the plaintiffs – who did not include the taxpayer here – were unable to show a need at that time for declaratory or injunctive relief. *Id.* at 582 n.1, 385 S.E.2d at 74 n.1.[1]

Col. Reich next argues that "a taxpayer seeking to void a tax statute as unconstitutional could not obtain that relief under the Administrative Procedure Act." Petition, p. 11. Where the constitutional validity of a statute is challenged before an administrative hearing officer or board in Georgia, the officer or board is without power to declare the statute unconstitutional. *Flint River Mills v. Henry*, 234 Ga. 385, 216 S.E.2d 895 (1975). However, the constitutional issues may be raised before the administrative hearing officer in a tax appeal brought under O.C.G.A. § 50-13-12, and will be resolved by the superior court on review of the agency decision. *See Georgia Real Estate Commission v. Burnett*, 243 Ga. 516, 255 S.E.2d 38 (1978). *See generally State Board of Equalization v. Trailer Train Co.*, 253 Ga. 449, 320 S.E.2d 758 (1984) (involving ad valorem tax appeals brought under O.C.G.A. § 48-2-18).

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[1] Col. Reich complains that he was denied declaratory and injunctive relief in *Salter, et al. v. The State of Georgia, et al.*, Fulton Superior Court, Civil Action No. D-71448. Nothing which occurred in the *Salter* case is properly a matter of record in this litigation. *See* pp. 5-6 *supra*. Nevertheless, *Salter* was filed after *Davis*, seeking to declare Georgia's income tax scheme invalid, and the litigation did not ask for refunds of taxes which had already been paid. The complaint in *Salter* was dismissed by the trial court after the General Assembly's amendments to Georgia's income tax statutes mooted the claim concerning the constitutionality of such statutes.

Bonding requirements

The taxpayer does not appear to dispute that he could have excluded his federal retirement benefits from income reported on his Georgia return and appealed the resulting deficiency assessment under O.C.G.A. § 48-2-59. Instead, he argues that this predeprivation remedy does not satisfy Due Process because it requires that the taxpayer provide adequate security in case he loses. *See* O.C.G.A. § 48-2-59(c). Petition, p. 12. Georgia's "affidavit of illegality" procedure also requires "a good and solvent bond in such an amount to cover the total of any adverse judgment". O.C.G.A. § 48-3-1.

Col. Reich's argument was rejected by the Court over one hundred years ago. In *McMillen v. Anderson*, 95 U.S. 37 (1877), the taxpayer argued that a statute which permitted the collection of disputed taxes to be enjoined was insufficient for Due Process purposes because the statute required that a bond be posted for double the amount at issue. "[I]t is said that this is not due course of law, because the judge granting the injunction is required to take security of the applicant, and that no remedial process can be within the meaning of the Constitution which requires such a bond as a condition precedent to its issue." *Id.* at 42. This assertion gave the Court but little pause:

> It can hardly be necessary to answer an argument which excludes from the definition of due process of law all that numerous class of remedies in which, by the rules of the court or by legislative provisions, a party invoking the powers of a court of justice is required to give that security which is necessary to prevent its process from being used to work gross injustice to another.

Id. See generally Lindsey v. Normet, 405 U.S. 56, 77 (1972) ("a State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue").

In *Ownbey v. Morgan*, 256 U.S. 94 (1921), this Court rejected the argument that Due Process was violated by a state statute which required the defendant in a foreign attachment case to provide security before the defendant could appear and contest the merits of the plaintiff's demand.

> It is said the essential element of due process – the right to appear and be heard in defense of the action – is lacking. But the statute in plain terms gives to defendant the opportunity to appear and make his defense, conditioned only upon his giving security to the value of the property attached. Hence the question reduces itself to whether this condition is an arbitrary and unreasonable requirement, so inconsistent with established modes of administering justice that it amounts to a denial of due process.

Id. at 102-103. The Court held that the bond requirement did not deny the defendant's Due Process rights, observing that "[t]he due process clause does not impose upon the States a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall." *See generally Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 553 (1949) ("A state may [generally] set the terms on which it will permit litigations in its courts[,

without thereby offending Due Process]. . . . [I]t is [normally] within the power of a state to close its courts to . . . litigation if the condition of reasonable security is not met.")

Georgia's failure-to-pay penalty

Col. Reich maintains that Georgia's predeprivation remedies do not satisfy Due Process because if he had used such a remedy and lost, he might have had to pay a 25% failure-to-pay penalty. *See* O.C.G.A. § 48-7-86(a)(1)(B). Of course, if a taxpayer contests his liability prior to payment and prevails, no such amounts would be due. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Anderson v. Manzo*, 380 U.S. 545, 552 (1965)). In any event, this penalty – which equals one-half of 1 percent per month, up to a *maximum* of 25% – may not be imposed "when . . . the failure is due to reasonable cause and not due to willful neglect." O.C.G.A. § 48-7-86(a)(2).

There is no conceivable Due Process problem with the sufficiency of a pre-payment remedy which does not preclude the imposition of a penalty, not exceeding 25%, when a taxpayer does not have a good faith, reasonable basis for his refusal to pay. *See generally Reisman v. Caplin*, 375 U.S. 440, 446-47 (1964) ("It is urged that the penalties of contempt risked by a refusal to comply with [IRS] summonses are so severe that the statutory procedure [for contesting such a summons] amounts to a denial of judicial review. . . . It is sufficient to say that noncompliance is not subject to prosecution thereunder when the summons

is attacked in good faith."); *Wagner Electric Corp. v. Thomas*, 612 F. Supp. 736 (D. Kan. 1985) ("even though a penalty might discourage a party from seeking judicial review, that penalty [can] be enforced against a party [who lacks] an objectively good faith challenge"). "[T]he Constitution [does not] dictate[] risk-free litigation. . . . [T]he Constitution is offended [only] when the penalty system is of such a nature as to create a *virtual roadblock* to judicial review." *Ford Motor Co. v. Coleman*, 402 F. Supp. 475, 484 (D.D.C. 1975) (emphasis added). Col. Reich has no support for his contention that a predeprivation remedy is not "fair and meaningful" unless a losing taxpayer is never subject to penalties, no matter how untenable the taxpayer's reasons for not paying in the first instance.[2]

The accrual of interest

The taxpayer also asserts that Georgia's predeprivation remedies violate Due Process because a taxpayer has to pay interest if he loses. Petition, p. 13. "[I]nterest [is merely] a means of compensation", *United States v. Childs*, 266 U.S. 304, 307 (1924), designed to insure that a state involved in litigation with a taxpayer who has not paid the disputed liability does not lose the time-value of any

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[2] Col. Reich suggests that the Georgia Revenue Department will in fact assess the failure-to-pay penalty against any taxpayer pursuing a predeprivation remedy, because such a penalty was assessed against him for 1988 despite "a bona fide, good faith, and reasonable challenge". Petition, pp. 15-16. In fact, the taxpayer was assessed a penalty for failing to pay the amount reflected on his own return for 1988 as due.

amounts eventually found to be due. It makes no sense to maintain that a predeprivation remedy is not "fair and meaningful" unless a losing taxpayer is never subject to interest. This standard is in no way suggested by a fair reading of *McKesson* or any other case, and Respondents know of no pre-payment remedy anywhere which meets such a test.

The "risk" of criminal prosecution.

Col. Reich argues that Georgia's predeprivation remedies do not satisfy Due Process because "not paying the contested tax *always* creates the risk that *some* prosecutor will pursue criminal prosecution [and t]he only clear and certain way to avoid this risk is to pay the tax." Petition, p. 15 (emphasis added). In fact, Col. Reich and amici have asserted that the State Revenue Commissioner is obligated to prosecute criminally any taxpayer who has used an accepted method to pursue a reasonable, good faith predeprivation challenge to his tax liability. *See generally* Petition, pp. 15-16. It is uncontested that Col. Reich was never so much as threatened with prosecution if he elected to pursue a predeprivation procedure for contesting his tax liability.

The taxpayer's contention regarding criminal prosecution is untenable. A taxpayer who has used an accepted method to assert a reasonable, good faith predeprivation challenge to his taxes is not properly subject to criminal prosecution in Georgia. The mere possibility that some state official, acting unreasonably or in bad faith, could conceivably try to prosecute under such circumstances does not make Georgia's predeprivation remedies

inadequate for Due Process purposes. The Commissioner is unaware of any jurisdiction which does not have appropriate criminal sanctions for taxpayers who willfully refuse to pay taxes they lawfully owe. *See, e.g.*, 26 U.S.C. § 7203. Simply put, Col. Reich believes that no predeprivation remedy satisfies Due Process, and that the *McKesson* inquiry is actually meaningless.

In addition, Col. Reich could not in any event have been prosecuted under the criminal statutes cited to this Court. Petition, p. 13. While Code Section 48-7-2 provides that it is a misdemeanor "for any person who is required to pay any tax . . . imposed by [the income tax provisions of the Revenue Code] to fail to . . . [p]ay the tax", this portion of the statute was declared unconstitutional prior to the date on which Col. Reich would have been required to file his return for 1985, the first tax year at issue in this case. *See State v. Higgins*, 254 Ga. 88, 326 S.E.2d 728 (1985). Code Section 48-16-12(b) provides that "any person who . . . willfully fails to pay taxes owing . . . , with intent to evade payment of the taxes owed . . . shall be guilty of a felony." However, that statute was not enacted until 1992, *see* 1992 Ga. Laws 1249, and therefore could not have been applied to Col. Reich if he had decided to contest his 1985, 1986, 1987, and 1988 taxes prior to payment. *See generally* U.S. Const., Art. I, § 10 ("No State shall . . . pass any . . . ex post facto Law").

Code Section 48-7-5, which was enacted by the General Assembly in 1987, provides that "[a]ny person who willfully evades or defeats or willfully attempts to evade or defeat, in any manner, any income tax, penalty, interest, or other amount in excess of $3,000.00 . . . shall . . . be

guilty of a felony." This statute could not have been applied ex post facto to Col. Reich if he had pursued a predeprivation remedy to challenge his 1985 and 1986 taxes. Nor could it have been used against him for later years, since the amounts which he disputes do not total as much as $3,000.00 in any such subsequent period. In addition, federal cases may be used as aids in interpreting Georgia tax provisions patterned after federal statutes. *Blackmon v. Mazo*, 125 Ga. App. 193, 196, 186 S.E.2d 889, 891 (1971). This Court has indicated that a taxpayer with a sincerely held belief that a statute is unconstitutional has not acted "willfully", within the meaning of the criminal provisions of 26 U.S.C. § 7201, when he refuses to pay the disputed tax and pursues his predeprivation remedy before the U.S. Tax Court – even where his belief concerning the statute's validity is objectively unreasonable. *Cheek v. United States*, 498 U.S. 192, 206 (1991).

Collection during a predeprivation tax dispute

There is no authority for the taxpayer's claim that collection action may be taken in Georgia against a person whose tax liability is already in court pursuant to a proper appeal under O.C.G.A. § 48-2-59. The requirement in Code Section 48-2-59(c) that a taxpayer provide "a surety bond or other security . . . to pay any tax . . . which is found to be due by a final judgment of the court" precludes the need for collection of the disputed liability during the litigation. Georgia's APA expressly provides a means for staying enforcement of a tax assessment pending a final ruling in any action brought under O.C.G.A. § 50-13-12. *See* O.C.G.A. §§ 50-13-12(c), -19. An action for declaratory and injunctive relief necessarily contemplates

a stay of enforcement, as does an "affidavit of illegality" under Code Section 48-3-1.

II. THE GEORGIA SUPREME COURT, BY CONSTRUING GEORGIA'S INCOME TAX REFUND STATUTE TO BE INAPPLICABLE TO TAXES PAID UNDER A LAW LATER HELD INVALID, DID NOT DEPRIVE THE PETITIONER OF AN ALLEGED STATUTORY RIGHT TO SUCH A REFUND, IN VIOLATION OF DUE PROCESS

The taxpayer also argues that the Georgia Supreme Court, by virtue of its interpretation of O.C.G.A. § 48-2-35, has deprived him of a statutory right to the refunds he seeks, in violation of Due Process. The taxpayer's contention is based on his assertion that "until *Reich I*, it was settled Georgia law that the refund statute provided relief for illegal and unconstitutional taxes." Petition, p. 21. Even if the taxpayer were correct in so characterizing Georgia law before *Reich I* – which Respondents dispute, *see* pp. 26-27 *infra* – his constitutional argument is wholly without merit.

An unforeseeable judicial enlargement of a criminal statute, applied retroactively, may violate a defendant's Due Process right "to fair warning of that conduct which will give rise to criminal penalties." *Marks v. United States*, 430 U.S. 188, 191 (1977). But in the civil context, "[n]o one has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *New York Central Railroad Company v. White*, 243 U.S. 188, 198 (1917).

> Even if it be true . . . that the [state court] departed from earlier and well-established precedents to meet the exigencies of this case, whatever might be thought of the justice or wisdom of such a step, the Constitution of the United States is not infringed. . . . [T]he decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because it is wrong or because earlier decisions are reversed.

Patterson v. Colorado, 205 U.S. 454, 461 (1907). *Accord Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450 (1924) ("the mere fact that the state court reversed a former decision to the prejudice of one party does not take away his property without due process of law").

The case upon which the taxpayer largely relies, *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), is easily distinguished on its facts. The plaintiff in *Brinkerhoff* brought suit in Missouri to enjoin the collection of certain disputed taxes, using the only remedy which, according to settled state law, was available to contest such liabilities. After the trial court dismissed the plaintiff's complaint, an appeal was taken to the Missouri Supreme Court. The Missouri Supreme Court affirmed, holding that a suit in equity was improper because the plaintiff had not first exhausted an administrative remedy before the Missouri State Tax Commission. In so holding, the Court overruled a prior decision that the administrative remedy could not be used in such cases. By this time, however, it was too late for the plaintiff to invoke the alternative procedure.

This Court reversed, stating that "[i]t is plain that the practical effect of the judgment of the Missouri court is to deprive the plaintiff of property without affording it *at any time* an opportunity to be heard in its defense." 281 U.S. at 678 (emphasis added).

> [U]ntil . . . the [Missouri Supreme Court's] opinion in the case at bar was delivered, the Tax Commission could not, because of [the Missouri Supreme Court's earlier decision], grant the relief to which the plaintiff was entitled on the facts alleged. After [the Missouri Supreme Court's opinion], the Commission could not grant such relief to this plaintiff because, under the decision of the court in this case, the time in which the Commission could act had long expired. Obviously, therefore, *at no time* did the State provide to the plaintiff an administrative remedy against the alleged illegal tax.

Id. at 679 (emphasis added). In the Court's view, "[i]f the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its *ever* having had an opportunity to defend against the exaction." *Id.* at 679. The Court was careful to point out, however, that "[s]tate courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions." *Id.* at 681 n.8.

Because there were ample other procedures by which Colonel Reich might have contested the Georgia tax on his federal retirement benefits, this case is unlike *Brinkerhoff*, and the taxpayer is no better off than any

litigant who "assume[s] the risk that the ultimate interpretation by the highest court [of any particular procedure] might differ from [his] own." *Brinkerhoff*, 281 U.S. at 682 n.9. The taxpayer's Due Process attack on the Georgia Supreme Court's interpretation of O.C.G.A. § 48-2-35 is wholly without merit.

The cases cited by the taxpayer do not in any event support his claim that "[f]or more than 50 years, Georgia's refund statute . . . has provided an unqualified right to refunds of taxes" paid under these circumstances. Petition, p. 19. In *Wright v. Forrester*, 192 Ga. 864, 16 S.E.2d 873 (1941), the taxpayer – who had pursued a refund claim for amounts collected under an allegedly unconstitutional law – brought a mandamus action under the refund statute to compel approval of his claim. *Id.* at 866, 16 S.E.2d at 874. The Georgia Supreme Court held merely that the refund statute did not provide for mandamus, affirming the trial court's dismissal of the complaint. In later litigation involving identical taxes, the Georgia Supreme Court found that the refund statute did not apply at all, because the disputed amounts were for periods prior to the statute's effective date. *Eibel v. Forrester*, 194 Ga. 439, 441, 22 S.E.2d 96, 98 (1942).

In *Henderson v. Carter*, 229 Ga. 876, 195 S.E.2d 4 (1972), the Georgia Supreme Court affirmed the dismissal of a mandamus action seeking certain sales tax refunds because, among other reasons, the taxpayer had an adequate legal remedy under the refund statute. *Id.* at 880, 195 S.E.2d at 7. However, the plaintiff in that case did not argue that the tax statute under which the disputed amounts had been paid was itself unconstitutional. Rather, the plaintiff asserted only "that *the refusal . . . to*

refund such moneys amount[ed] to depriving the complainant . . . of [her] rightful property without due process of law." *Id.* at 877, 195 S.E.2d at 5 (emphasis added).

Col. Reich maintains that in *State v. Private Truck Council of America*, 258 Ga. 531, 371 S.E.2d 378 (1988) "the Georgia Supreme Court applied the limitation period in the refund statute to bar claims for unconstitutional taxes that were more than three years old." Petition, p. 22. However, in *Private Truck Council*, the Court plainly noted that "[t]his was not a suit brought for a refund under O.C.G.A. § 48-2-35." 258 Ga. at 534, 371 S.E.2d at 380.

Finally, the Georgia Supreme Court's passing reference to the refund statute in *Collins v. Waldron*, 259 Ga. 582, 385 S.E.2d 74 (1989), set out in footnote 1 of the court's opinion, is dictum which does not have the precedential weight which the taxpayer attributes to it. *See* pp. 14-15 *supra*. Nor did the Georgia Supreme Court "hold" in *James B. Beam Distilling Co. v. Georgia*, Nos. S93A1217 and S93A1218 (Ga. Dec. 2, 1993) (LEXIS, States library, Ga. file) (*"Beam II"*) that O.C.G.A. § 48-2-35 provides a means by which liquor distillers may receive refunds of taxes paid under a law subsequently declared unconstitutional. In *Beam II*, the Georgia Supreme Court ruled only that, assuming *arguendo* that Code Section 48-2-35 applied to Beam's claim, Beam lacked standing to obtain a refund of taxes which Beam had billed to its wholesalers as taxes and recovered from them.

CONCLUSION

Review on writ of certiorari is a matter of judicial discretion and should be granted only when there are special and important reasons for it. U.S. Sup. Ct. Rule 10; *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 73 (1955). Certiorari should not be granted "except in cases involving principles . . . of importance to the public as distinguished from that of the parties." *Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 393 (1923). *See generally* U.S. Sup. Ct. Rule 10.1 (regarding considerations governing review on writ of certiorari). Any supposed "conflict" between the decision of the Georgia Supreme Court and holdings elsewhere can be explained by the differences in such other state's pre- and post-payment remedial schemes. In addition, the constitutional arguments which Colonel Reich seeks to raise in this case have been settled by this Court's prior opinions and warrant no further review. Respondents therefore respectfully request that the petition be denied.

Respectfully submitted,

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